IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
August 19, 2008 Session

STATE OF TENNESSEE v. JAMES D. WILSON

Direct Appeal from the Circuit Court for Robertson County
No. 05-0015 John H. Gasaway, III, Judge

No. M2007-01854-CCA-R3-CD - Filed August 20, 2009

Defendant-Appellant, James D. Wilson ("Wilson"), was convicted by a Robertson County jury of second degree murder. He was sentenced as a Range II, multiple offender to serve forty years in the Tennessee Department of Correction. In this appeal, Wilson argues: (1) the insufficiency of the evidence, (2) the trial court erred by not declaring a mistrial or giving a curative instruction when the State referred to the victim's death in the instant case as a "murder" in its opening statement, (3) the jury charge given by the trial court was "incomplete" and "confusing" in violation of the United States and Tennessee Constitutions, and (4) his sentence is excessive. Following our review, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 as of Right; Judgment of the Circuit Court Affirmed

CAMILLE R. MCMULLEN, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and J. CURWOOD WITT, JR., J., joined.

Gregory D. Smith, Clarksville, Tennessee (on appeal) and Larry Wilks and Burton Glover, Springfield, Tennessee (at trial) for the defendant-appellant, James D. Wilson.

Robert E. Cooper, Jr., Attorney General and Reporter; Clarence E. Lutz, Assistant Attorney General; John W. Carney, Jr., District Attorney General; and Dent Morris and Jason White, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

Facts. Wilson was charged with the first degree premeditated murder of Sandy Aydlett, the victim in this case. He was convicted by a jury of second degree murder and does not dispute that on or about September 18, 2004, he shot and killed the victim. He claims, however, that the killing was in self-defense and challenges the sufficiency of the convicting evidence; thus, a review of pertinent trial testimony is necessary.

Randall Spivey, a dispatcher for the Robertson County Sheriff's Department, testified that on September 18, 2004, he received a 911 call from the Wilson residence on Huffman Road. The

caller wanted to speak with or obtain the phone number for Sergeant Paul McKissack. Spivey advised the caller that Sergeant McKissack was not available and that he could only take a message for Sergeant McKissack to return the call. Based on department protocol, Spivey then dispatched Deputy Brannon to the Wilson residence. The 911 call from the Wilson residence as well as Spivey's dispatch of Deputy Brannon were recorded and introduced into evidence. Spivey explained that codes "1070" and "1071" mentioned during the recording meant "dead on arrival" and "homicide."

Deputy John Brannon of the Robertson County Sheriff's Department was the first officer to respond to the scene and initially thought that he was responding to a "911 misdial." As such, he explained that his job required him to "[a]rrive at the scene [of the call], speak with the residents there and make sure that everything was okay." He was dispatched to the Wilson residence on Huffman Road and arrived just after 2:00 p.m. He pulled into the driveway and observed a very large dog outside the residence. Because of the dog, Deputy Brannon decided not to get out of his vehicle and instead sounded his air horn. Wilson then came out of the residence and approached Deputy Brannon's vehicle. Deputy Brannon asked what was going on, and Wilson replied, "Brother, we have a dead body. Dude came over here and tried to perform homosexual acts on me." Deputy Brannon asked Wilson to show him the body, and Wilson complied.

Deputy Brannon stated he placed hand restraints on Wilson for safety reasons because "at that point, [he] wasn't exactly sure . . . what [he] had just encountered. [He had] a subject there with blood on him. [He had] a dead body on the scene. [He was] not sure if there [was] anyone else at the residence . . . ." After putting hand restraints on Wilson, Deputy Brannon advised Wilson of his Miranda rights. Wilson said he completely understood his rights because he was a lawyer. Deputy Brannon placed Wilson in the back of his patrol unit and asked for his name. Wilson did not initially respond and questioned why Deputy Brannon was at his house and how Deputy Brannon got a call to come to his house. Wilson later told Deputy Brannon that his name was "Jason Thunderquill." Deputy Brannon drove down the driveway, secured the scene, and called for assistance from other officers.

Deputy Brannon confirmed that his incident report reflected Wilson "had several small marks on his upper body which appeared to be from a struggle." The report also indicated the motivation for the homicide was "anti-male homosexual gay" behavior because Wilson told him the victim "made [a] homosexual pass at him." Deputy Brannon noted that Wilson had a strong odor of alcohol, was nervous, and seemed confused during their interaction.

Deputy Brannon also testified that he witnessed the statement Wilson provided to Lt. Bennett and Detective Head from within his patrol unit. He read Wilson's statement from his report for the court:

> Mr. Wilson stated that he went to O'Charley's Restaurant and met a man by the name of Stacy, and the two of them sat at the bar, had some alcoholic beverages to drink. Mr. Wilson invited Stacy back to the residence at [] Huffman Road for

> some more drinks. Mr. Wilson told Stacy that Mr. Wilson's wife was out of town so they could party at his residence. Mr. Wilson stated that they went to the residence, had some more drinks and watched some movies and Stacy made a homosexual pass towards Mr. Wilson. Mr. Wilson rejected and said that he is not like that. Stacy picked up a .38 caliber handgun, pointed it at Mr. Wilson and said you are going to be my boy tonight. Mr. Wilson says hold on, time out. I need to go pee first. Instead of going to the bathroom, Mr. Wilson went to another room in the residence and got a shotgun and returned to the living room and pointed the shotgun at Stacy and said who is going to be whose boy now? Both subjects put their weapons down and began to talk. Mr. Wilson attempted to get Stacy to leave the residence. Stacy reached for the .38 caliber handgun again and both subjects struggled for possession of the weapon. Mr. Wilson turned the weapon that Stacy had possession of and discharged the weapon striking Stacy. Mr. Wilson told Detective Head and Lt. Bennett that he has nothing to hide and that is why he called the Robertson County Sheriff's Office.

Deputy Brannon identified Wilson's injuries from photographs taken at the scene. He characterized Wilson's injuries as "very small scratches on the upper body" that did not appear to be serious or in need of immediate medical treatment. Deputy Brannon additionally testified that he recovered four spent rounds from the back rear seat of his patrol unit just after Wilson had exited the vehicle. He stated that Wilson told him about the ammunition only after it was discovered.

Jason Hudgens, a patrol deputy for the Robertson County Sheriff's Department, also responded to the Wilson residence after receiving an officer assistance call. When he arrived, he met Deputy Brannon, who was located at the base of the driveway. The defense stipulated that Deputy Hudgens went to the scene and helped secure it. Although he and three other deputies engaged in a "tactical entry" of the Wilson residence, Deputy Hodges stated nothing in the residence was disturbed. He also assisted in the collection of suspected blood that was recovered from the driveway.

Lieutenant Donald Bennett, the chief detective for the Robertson County Sheriff's Department, arrived at the Wilson residence around two o'clock on the afternoon of September 18, 2004. After speaking with the other deputies on the scene, he approached Wilson in the patrol unit and advised Wilson of his rights again. Wilson told Lt. Bennett that "he was willing to cooperate and wanted to tell [him] what happened." Lieutenant Bennett testified to the statement Wilson gave to him, which contained essentially the same information as Wilson's statement to Deputy Brannon. Lieutenant Bennett stated that Wilson told him that he was a lawyer, but Lt. Bennett later learned this was not true.

Lieutenant Bennett testified that the crime scene did not corroborate Wilson's statement. Specifically, he stated:

> There were several things that [Wilson] told about the location of the gun, how things happened, a lot of things that we could not determine that did not match the scene itself that caused us to continue to go back and talk to him to see if there was something that we were missing or we weren't being told. The crime scene, in and of itself, did not show physical evidence that would suggest that a large struggle, as described, happened.

When asked if there was any evidence that a struggle may have occurred, Lt. Bennett stated, "The only thing I recall seeing in the residence was a bar stool that one of the portions of the leg was broken off." He explained, "[O]ne of the rungs that ties the two legs together . . . was broken and the pieces were found in a trash can in the kitchen." In addition, there was a large amount of blood located "to the rear of the sofa, towards the den area, in the kitchen area of the home, in a carpeted area that was cleared. The blood was pooled on the carpet." He said, "[It] also appeared . . . that a body had been dragged out of the home through the kitchen area." Lieutenant Bennett stated there were two bullets found inside the home. The first bullet was lying "on the carpet near the corner of the room where the blood was," and the second bullet was found in "the sheetrock in the kitchen area."

Lieutenant Bennett testified that although Wilson told them the gun used to kill the victim was located in the room where the killing took place, they actually found it in an area that Wilson called "the gun vault," which was really a closet containing weapons and ammunition. Lieutenant Bennett recovered four spent .38 caliber cartridges and one live cartridge from Wilson's right front pocket. The evidence was sent to the Tennessee Bureau of Investigation (TBI) for analysis. Lieutenant Bennett further testified that he obtained another statement from Wilson wherein Wilson re-enacted the offense from within his residence. This statement was videotaped and admitted as evidence.

Once the crime scene investigation was complete, Wilson was transported to the Sheriff's Department and taken to the interview room in the Criminal Investigation Division for a final interview. Lieutenant Bennett and Detective Head conducted Wilson's final interview, which was also recorded and introduced into evidence. Lieutenant Bennett testified that Wilson was advised of his rights a third time, waived his rights, and once again expressed his willingness to cooperate. He stated that Wilson did not appear to be intoxicated and did not tell him that the victim had been to his house on previous occasions.

Scott Jones, a detective with the Robertson County Sheriff's Department, testified that he was also dispatched to the Wilson residence on September 18, 2004. His primary role was to photograph and videotape the crime scene. He also pulled a bullet fragment from the wall in the kitchen, which was introduced into evidence. Several photographs depicting the condition of the Wilson residence at the time of the offense were also admitted into evidence. Detective Jones testified that a .38 caliber revolver and a matching holster were recovered from the Wilson residence, both of which were admitted into evidence. There were two other shotguns and ammunition recovered from the scene. He also recovered a foot rail to a bar stool from the trash can in the kitchen, a pair of rubber

gloves, and some towels. Detective Jones said that he collected a pair of blue jeans and khaki shorts from the upstairs bathroom because they appeared to have blood on them.

Detective Jones also photographed the vehicle in which the victim's body was found. He stated the victim's body was face-down in the back seat of his vehicle. He searched the barn area outside of the Wilson home and recovered additional evidence including some mail in the back of a John Deere Gator, a blue t-shirt, and "small garbage bags . . . that had . . . paper towels that looked like blood on them and . . . a lighter . . . ." The parties stipulated to the admission of a videotape depicting the outside barn area of the Wilson residence where these items were recovered. On cross-examination, Detective Jones stated there was no "blood substance" found on the John Deere Gator.

Paul McKissack, a sergeant with the Robertson County Sheriff's Department, testified that Wilson did not contact him to report a homicide prior to the discovery of the victim's body. Although Sergeant McKissack had known Wilson's wife for over fifteen years, he testified that he did not know Wilson. Sergeant McKissack stated that he received a call from dispatch about 2:30 p.m. indicating Wilson's wife was attempting to contact him. Because he did not write the number down correctly, he did not speak with Wilson's wife until after the victim's body was discovered.

Dr. Staci Turner, the medical examiner who performed the autopsy on the victim, testified that the cause of death was a gunshot wound to the victim's head. She stated, "[The victim] had an entrance wound in his left temporal scalp . . . [a]nd [] an exit wound in his right parietal scalp." She stated that "[the victim] would have been immediately incapacitated by this wound because it went through his mid-brain, which is [] the brain stem, which controls the breathing and the heart rate." She further explained, "This was a contact wound, which means that the gun was in contact with the skin at the time that it was shot." Dr. Turner examined other parts of the victim's body and found abrasions on the right and left side of his forehead and his nose, on the right and left side of his chest, right elbow, the back of his right and left hands, and his back. She also found bruises on his left arm and the front of his legs. Photographs of the injuries were shown to the jury. Dr. Turner opined the majority of the injuries were either pre-mortem or were inflicted right at the time of death.

Dr. Turner also testified that the victim had a blood alcohol level of .28 percent and a vitreous alcohol level of .26 percent. She explained these results were consistent with the victim's "just having [drunk] shortly before his death." She determined the victim was five feet five and one-half inches tall and weighed 164 pounds. On cross-examination, she acknowledged that the victim's injuries were "possibly consistent with a struggle[.]" She confirmed that the victim's blood alcohol level was three and a half times the legal limit to drive a vehicle in Tennessee.

Richard Head, a detective with the Robertson County Sheriff's Department, was the "on-call" detective when Deputy Brannon discovered the victim's body. He arrived at the Wilson residence "around 2:40 or 2:45 [p.m.]" and was advised by the other deputies at the scene. He later approached Wilson in the back of Deputy Brannon's patrol car, observed "a scrape or a bruise" on his right back shoulder, and a "spot" on his lower back region. He took photographs of the condition of Wilson's body which were admitted into evidence. Detective Head did not observe anything

broken in the residence other than a "stool chair" with a broken rung. He observed two holes in a wall in the kitchen that were consistent with the size of a bullet. He prepared the crime scene diagram depicting the condition of the Wilson residence during the search.

Detective Head additionally testified that items suspected as blood were sent to the TBI for testing and were confirmed as human blood. The towels that were recovered from the outside barn area of the Wilson home also tested positive for human blood. Additionally, the cigarette lighter that was recovered from one of the bags in the barn area belonged to the victim. Detective Head stated that DNA tests confirmed the blood on all of the above items came from the victim. Detective Head also conducted some background investigation on the victim. He went to the victim's residence, which was shared by Brandon Ford and Amanda Belcher, to look through the victim's belongings. Detective Head determined that the victim's roommates had removed the victim's pornographic magazines to avoid embarrassing the victim's family. He reviewed the magazines, found no pornographic material of any males, and stated, "it was all just Playboy magazines."

Detective Head interviewed a variety of people from Applebee's and O'Charley's restaurants as a part of his investigation. In addition, he obtained and reviewed phone records. He found "a big type lock pick kit like you would use at a dealership" inside the victim's vehicle at the Wilson residence. Detective Head admitted that "a lot of things [had been] set back up" at the Wilson residence by the time he entered the home. Detective Head determined Wilson was six feet one inch and weighed one hundred ninety pounds.

Pamela Giardono, the victim's friend, testified that she worked at the O'Charley's restaurant in Springfield from January 2004 to May 2005. She explained that she worked mainly in the bar area of the restaurant and that the victim would come into the bar three or four times a week. She stated that Wilson was also an O'Charley's customer. Giardono remembered the first time she met Wilson, sometime in June of 2004, because Wilson was "passed out," and the victim drove him home. She said that it was not unusual for the victim to "help anybody" and that the victim drove Wilson home in Wilson's vehicle. When the victim returned to the restaurant later that night, Giardono recalled the victim saying that Wilson "kind of flipped out" and "didn't know who [the victim] was . . ." Giardono further testified that, after that night, Wilson wrote a note addressed to the victim and an employee at the restaurant, apologizing for his behavior, and brought it to the restaurant.

Giardono stated that Wilson and the victim continued to frequent the restaurant after the night that Wilson had "passed out." Giardono further stated that Wilson always bought the victim drinks, and observed them "talk and hang out." When Wilson was at the restaurant, he said that "whatever [the victim] wanted was on his tab." Giardono recalled that between June of 2004 and September of 2004,Wilson bought drinks for the victim at least five times. Giardono was bartending on the night of the offense, and she observed Wilson and the victim having a conversation and Wilson paying for the victim's drinks. Wilson left between 6:00 and 7:00 p.m., but the victim stayed at the restaurant and had another drink. Giardono testified that when Wilson called the restaurant later that night, she answered the phone, and Wilson asked, "[W]as Sandy coming over?" She told him she

did not know and handed the phone to the victim. She stated the victim spoke with Wilson for "just a couple of minutes" and left shortly thereafter.

Brandon Ford, the victim's friend and roommate, testified that he had observed the victim handle disputes with other people and opined that the victim had a peaceful character. Ford also stated the victim smoked cigarettes and identified the cigarette lighter recovered from the outside area of Wilson's residence as belonging to the victim. Ford testified that the victim had a subscription to Playboy magazine, and he had never observed the victim engage in any homosexual activity. Ford acknowledged that the victim spent some time with a homosexual bartender. However, Ford said he never observed the victim and the bartender alone, and he never observed any homosexual behavior between them.

Robert Peterson, the O'Charley's restaurant manager, confirmed that three weeks prior to the victim's death, he had asked the victim to take Wilson home because he had "passed out." Peterson stated the victim returned to the restaurant "thirty or forty-five minutes" later.

James Smith, a patron of O'Charley's restaurant, testified that on the night of the offense, he arrived at the restaurant at "approximately 8:30 [p.m.]." He sat next to the victim at the bar, they both had a drink, and the victim left fifteen minutes later.

James Whitfield, a longtime friend of the victim, testified that the victim "was probably the most laid back, easy to get along with person you would ever want to meet. He would never think about harming another person." He said the victim "was the kind of person if someone was provoking him, and wanted him to fight, he would basically just say whatever and turn around and walk away. He didn't care to have any part of any type of physical violence with another person." Whitfield also stated that he never observed the victim engaged in any homosexual activity.

Vicki Wilson, a school teacher, knew the victim from O'Charley's restaurant. She stated she never saw the victim "angry . . . or mad at anybody." She also testified that the victim was interested in females.

Jett Taylor was "very close friends" with the victim and had known him since 2002. She stated that she "shared feelings" with the victim even though they were never intimate. She said the victim helped her move her furniture, talked to her "every other night" on the phone, bought her gifts, and sent her flowers.

Joyce Penick, who lived "[t]wo houses up" from Wilson, testified that she heard "ten or more" gunshots coming from the direction of Wilson's house between 7:00 and 8:00 p.m. on the night of the offense. She also testified that she heard additional gunshots from the same direction some time before noon the next day.

Wilson did not testify and did not present any proof at trial.

ANALYSIS

I. Sufficiency of the Evidence. Wilson argues the evidence is insufficient, as a matter of law, to support a verdict of guilty beyond a reasonable doubt of second degree murder but instead only supports a verdict of voluntary manslaughter. The State contends any rational juror could find that Wilson knowingly killed the victim. We agree with the State.

The State, on appeal, is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn from that evidence. State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). When a defendant challenges the sufficiency of the evidence, this Court must consider "whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). Similarly, Rule 13(e) of the Tennessee Rules of Appellate Procedure states, "Findings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support a finding by the trier of fact of guilt beyond a reasonable doubt." Guilt may be found beyond a reasonable doubt through direct evidence, circumstantial evidence, or a combination of the two. State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990) (citing State v. Brown, 551 S.W.2d 329, 331 (Tenn. 1977) and Farmer v. State, 343 S.W.2d 895, 897 (Tenn. 1961)). The trier of fact must evaluate the credibility of the witnesses, determine the weight given to witnesses' testimony, and must reconcile all conflicts in the evidence. State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996). When reviewing issues regarding the sufficiency of the evidence, this Court shall not "reweigh or reevaluate the evidence." State v. Philpott, 882 S.W.2d 394, 398 (Tenn. Crim. App. 1994) (citing State v. Cabbage, 571 S.W.2d 832, 836 (Tenn. 1978), superseded by statute on other grounds as stated in State v. Barone, 852 S.W.2d 216, 218 (Tenn. 1993)). This Court has often stated that "[a] guilty verdict by the jury, approved by the trial court, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the prosecution's theory." Bland, 958 S.W.2d at 659 (citation omitted). A guilty verdict also "removes the presumption of innocence and replaces it with a presumption of guilt, and the defendant has the burden of illustrating why the evidence is insufficient to support the jury's verdict." Id. (citing State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982)).

In order to sustain a conviction for second degree murder, the State was required to prove beyond a reasonable doubt that Wilson unlawfully and knowingly killed another person. T.C.A. § § 39-13-201, 210(a)(1). Tennessee Code Annotated section 39-11-302(b) defines the culpable mental state of "knowing":

> A person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result.

Voluntary manslaughter, a lesser included offense of second degree murder, is "the intentional or knowing killing of another in a state of passion produced by adequate provocation sufficient to lead a reasonable person to act in an irrational manner." Id. § 39-13-211(a).

Although Wilson admits to shooting and killing the victim, he claims the homicide was committed in the "heat of passion" based on "mutual combat." In State v. Johnson, this court stated:

> Mutual combat is not a statutory defense. The underlying facts may qualify, however, as "adequate provocation sufficient to lead a reasonable person to act in an irrational manner." Whether the acts constitute a "knowing killing" (second degree murder) or a killing due to "adequate provocation" (voluntary manslaughter) is a question for the jury.

909 S.W.2d 461, 464 (Tenn. Crim. App. 1995) (internal citations omitted). In State v. Williams, 38 S.W.3d 532 (Tenn. 2001), the Tennessee Supreme Court adopted the reasoning in Johnson and abrogated the mutual combat doctrine:

> Although the statutory elements of second degree murder and voluntary manslaughter changed with the adoption of the revised criminal code in 1989, the current definition of voluntary manslaughter preserves the common law concept of "provocation." Even though the common law doctrine of mutual combat is directly related to the provocation element, we conclude that the revised code abrogated the mutual combat doctrine. The essence of the doctrine has been incorporated into the elements of the voluntary manslaughter statute. The facts and circumstances surrounding a killing occasioned by mutual combat may establish that the defendant was impassioned as a result of adequate provocation. Consequently, we hold that the trier of fact must consider all facts surrounding a killing, including the facts giving rise to an agreement to combat, to determine whether the killing resulted from "a state of passion produced by adequate provocation sufficient to lead a reasonable person to act in an irrational manner."

Williams, 38 S.W.3d at 539.

Viewed in the light most favorable to the State, the proof supported Wilson's conviction of second degree murder. It is clear from Wilson's three statements to law enforcement that he was attempting to convince them that he shot the victim only in response to threats and homosexual advances. However, after hearing all of the facts and circumstances surrounding the killing, the jury, as was their prerogative, rejected Wilson's "heat of passion" theory. Further, Lt. Bennett testified that Wilson's statement was inconsistent with the physical evidence found at the crime scene. As previously stated, it is not the function of this court to re-weigh or re-evaluate the proof presented at trial. See Philpott, 882 S.W.2d at 398. We conclude, upon our review of the record, that a rational juror could find that Wilson knowingly and unlawfully killed the victim beyond a reasonable doubt. Accordingly, Wilson is not entitled to relief on this issue.

II. State's Reference to "Murder" in Opening Statement. Wilson argues the trial court erred in not giving a curative instruction to the jury or in not declaring a mistrial when the State

referred to the death in the instant case as a "murder" in opening statements. The State contends this issue is waived because he failed to request relief in the first instance during the argument.

We agree with the State that Wilson has waived this issue by failing to make a contemporaneous objection to the prosecutor's remark at trial. See Tenn. R. App. P. 36(a); State v. McPherson, 882 S.W.2d 365, 373 (Tenn. Crim. App. 1994); State v. Gregory, 862 S.W.2d 574, 578 (Tenn. Crim. App. 1993); and State v. Thomas, 818 S.W.2d 350, 364 (Tenn. Crim. App. 1991). Additionally, even if this Court were inclined to grant the requested relief, Wilson has failed to demonstrate that he was prejudiced in any way by the prosecutor's remark. See State v. Bigbee, 885 S.W.2d 797, 809 (Tenn. 1994) (holding that when a prosecutor makes improper remarks during a closing argument, the appellate court must determine "whether the impropriety affected the verdict to the prejudice of the defendant), superseded by statute on other grounds as stated in State v. Odom, 137 S.W.3d 572, 611 (Tenn. 2004)(Barker, J., dissenting); see also State v. Seay, 945 S.W.2d 755, 763 (Tenn. Crim. App. 1996) (holding that the defendant must show that prosecutor's remark was "so inflammatory or so improper that it affected the verdict to his or her detriment").

Waiver notwithstanding, our review of the record shows immediately following the prosecutor's remark, the trial court, sua sponte, called the parties to the bench. The trial court cautioned the prosecutor about referring to the homicide as a "murder" because that issue was for the jury to decide. The record shows that the remark was isolated and inadvertent. For these reasons, Wilson is not entitled to relief on this issue.

III. Jury Charge. Wilson claims the trial court provided the jury with "incomplete" or "confusing" jury instructions in violation of both the Tennessee and United States Constitutions. In response, the State contends the trial court's instruction fairly charged the jury concerning the elements of the lesser offenses and did not violate Wilson's constitutional right to a jury trial. We agree with the State.

A defendant has a "'constitutional right to a correct and complete charge of the law.'" State v. Litton, 161 S.W.3d 447, 458 (Tenn. Crim. App. 2004) (quoting State v. Teel, 793 S.W.2d 236, 249 (Tenn. 1990), superseded by statute on other grounds as stated in State v. Reid, 91 S.W.3d 247, 291 (Tenn. 2002)). Accordingly, trial courts have the duty to give "a complete charge of the law applicable to the facts of the case." State v. Davenport, 973 S.W.2d 283, 287 (Tenn. Crim. App. 1998) (quoting State v. Harbison, 704 S.W.2d 314, 319 (Tenn. 1986)). There is no requirement that a trial court be limited to using pattern jury instructions. State v. West, 844 S.W.2d 144, 151 (Tenn. 1992). When reviewing challenged jury instructions, we must look at "the charge as a whole in determining whether prejudicial error has been committed." In re Estate of Elam, 738 S.W.2d 169, 174 (Tenn. 1987) (citation omitted); see also State v. Phipps, 883 S.W.2d 138, 142 (Tenn. Crim. App. 1994).

As pertinent to this issue, the trial court instructed the jury regarding the elements of first degree premeditated murder as well as the following lesser included offenses: second degree

murder, voluntary manslaughter, reckless homicide, and criminally negligent homicide. The trial court also provided an instruction describing the duties of the court and the jury:

> The evidence in this case has been completed, and it is my duty now to instruct you as to the law. The law applicable to this case is stated in these instructions, and it is your duty to carefully consider all of them. The order in which these instructions are given is no indication of their relative importance. You should not single out any one or more of them to the exclusion of another or others but should consider each one in light of and in harmony with the others.

The court then proceeded to instruct the jury on the elements of each of the above offenses. The court instructed the jury on the elements of first degree premeditated murder, and provided the following definition for "intentionally":

> A person acts intentionally when that person acts with a conscious objective or desire to cause the death of the alleged victim.

The trial court instructed the jury as to second degree murder and provided the following definition for "knowingly":

> A person acts "knowingly" if that person acts with an awareness that his conduct is reasonably certain to cause the death of the alleged victim.
>
> The requirement of "knowingly" is also established if it is shown that the defendant acted intentionally.
>
> "Intentionally" has been previously defined.

The court instructed the jury regarding the difference between voluntary manslaughter and second degree murder:

> The distinction between voluntary manslaughter and second degree murder is that voluntary manslaughter requires that the killing result from a state of passion produced by adequate provocation sufficient to lead a reasonable person to act in an irrational manner.
>
> "Intentionally" and "knowingly" have been previously defined.

The trial court instructed the jury as to reckless homicide:

> A person act "recklessly" if that person is aware of but consciously disregards, a substantial and unjustifiable risk that the alleged victim will be killed. The risk must be of such a nature and degree that disregarding it constitutes a gross

deviation from the standard of care that a reasonable person would observe in the situation.

The requirement of "recklessly" is also established if it is shown that the defendant acted intentionally or knowingly.

"Intentionally" and "knowingly" have been previously defined.

The trial court also instructed the jury as to criminally negligent homicide:

"Criminal negligence" means that a person acts with criminal negligence when the person ought to be aware of a substantial and unjustifiable risk that the alleged victim will be killed. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the accused person's standpoint.

The requirement of criminal negligence is also established if it is shown that the defendant acted intentionally, knowingly or recklessly.

"Intentionally", "knowingly" and "recklessly" have been previously defined.

Wilson first argues the trial court erred by not providing the jury with "complete instructions on each lesser included offense, but instead used 'relation back' or 'incorporated' definitions of key words such as 'knowing', 'intentional' and 'reckless.'" Wilson contends that through dicta in State v. Page, 81 S.W.3d 781, 788 (Tenn. Crim. App. 2002), this court "specifically told the trial court [] not to cross-reference definitions in a murder case." We disagree.

In Page, the trial court provided the jury with an instruction that defined "knowingly" to include an appellant's awareness that (1) his conduct was of a particular nature, (2) a particular circumstance existed, or (3) his conduct was reasonably certain to cause the result. Id. at 786. Our primary concern in Page was the content of the instruction, not the form. We found reversible error because second degree murder had recently been defined as strictly "a result-of-conduct" offense. Id. at 788 (citing State v. Ducker, 27 S.W.3d 889, 896 (Tenn. 2000)). When the trial court in Page instructed the jury on multiple definitions of "knowingly" to find second degree murder, it effectively lessened the State's burden of proof. Id. Page provided a correct jury instruction defining "knowingly" in a second degree murder case for trial courts to use. Id. It is identical to the one given in the instant case with the exception of the last sentence which refers the jury to the previous definition of "intentionally."

In State v. Cravens, 764 S.W.2d 754, 756 (Tenn. 1989), the Tennessee Supreme Court stated:

> [A]ll of the elements of each offense should be described and defined in connection with that offense, although in [State v.] Martin[, 702 S.W.2d 560 (Tenn. 1985),] we did suggest that there could be cross-referencing or repetition in connection with the lesser offenses since jury instructions in felony cases are required by statute in this state to be written and physically delivered to the jurors for use in their deliberations. Rule 30(c), T[enn.] R. Crim. P.

Id. at 756.

Accordingly, we conclude that the trial court's references to the previous definitions of intentionally, knowingly, and recklessly for the lesser included offenses of second degree murder, voluntary manslaughter, reckless homicide, and criminally negligent homicide were not error as they constituted permissible cross-referencing. Therefore, the aforementioned definitions in the jury instructions were proper, and Wilson is not entitled to relief on this issue.

Wilson also claims the trial court erred when it "instruct[ed] the jury to only consider the lesser offense if, and only if, the jury finds the Defendant not guilty of a greater offense." In essence, Wilson challenges acquittal-first jury instructions.[1] Recently, in State v. Davis, 266 S.W.3d 896 (Tenn. 2008), petition for cert. filed, — U.S.L.W. — (U.S. Jan. 14, 2009) (No. 08-8252), the Tennessee Supreme Court rejected a similar challenge to acquittal-first jury instructions in violation of the constitutional right to a jury trial:

> [W]hile a defendant is entitled by our constitution to have the jury charged on all offenses encompassed within the indictment and supported by the proof, our constitution does not go so far as to mandate the order in which those offenses are considered. Our constitution also does not prohibit the requirement that a jury first reach a unanimous verdict of acquittal with respect to a greater offense before it proceeds to consider a defendant's guilt of a lesser-included offense.

Id. at 905.

Accordingly, the trial court properly instructed the jury in this case, and Wilson is not entitled to relief on this issue.

IV. Sentence. Wilson contends that his sentence is excessive. He argues that his sentence was enhanced based on facts not found by a jury in violation of Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004). The State counters that Wilson's sentence comports with the Sixth Amendment and is supported by the evidence. Indeed, the sentence imposed by the trial court

[1] In his reply brief, Wilson agreed that State v. Phedrek T. Davis, No. M2006-00198-CCA-R3-CD, 2007 WL 2051446 (Tenn. Crim. App., at Nashville, July 19, 2007), aff'd, 266 S.W.3d 896 (Tenn. 2008), was dispositive of this issue and requested this Court to "withhold a judgment" on this issue until the Tennessee Supreme Court ruled in the Davis case. The Tennessee Supreme Court affirmed this court's decision in Davis on October 17, 2008.

violated Blakely; however, we conclude that the sentence is justified by Wilson's prior criminal conviction for attempted second degree murder.

On June 24, 2004, the United States Supreme Court held in Blakely that "'[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" Id. at 301 (quoting Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63 (2000)). However, on April 15, 2005, the Tennessee Supreme Court held that the Tennessee Criminal Sentencing Reform Act of 1989 did not violate a defendant's Sixth Amendment right to a jury trial. See State v. Gomez, 163 S.W.3d 632, 654-62 (Tenn. 2005) ("Gomez I"), vacated and remanded, Gomez v. Tennessee, 549 U.S. 1190, 127 S. Ct. 1209 (Feb. 20, 2007). On May 18, 2005, the Tennessee legislature passed a new sentencing law, effective June 7, 2005, eradicating presumptive sentences and establishing advisory sentencing guidelines. A year and a half later, on January 22, 2007, the United States Supreme Court held that California's sentencing laws, which were very similar to Tennessee's pre-2005 sentencing act, violated the Sixth Amendment right to a jury trial, based on Blakely. See Cunningham v. California, 549 U.S. 270, 293, 127 S. Ct. 856, 871 (2007). On October 9, 2007, in light of Blakely and Cunningham, the Tennessee Supreme Court held that a defendant's Sixth Amendment right to a jury trial is not satisfied when a trial court enhances a defendant's sentence using factors that were not found by a jury. State v. Gomez, 239 S.W.3d 733, 741 (Tenn. 2007) ("Gomez II") (citing Cunningham, 549 U.S. at 274, 127 S. Ct. at 860).

Recently, this court concluded that "[t]he presumptive sentence may be exceeded without the participation of a jury only when the defendant has a prior conviction and/or when an otherwise applicable enhancement factor was reflected in the jury's verdict or was admitted by the defendant." State v. Phillip Blackburn, No. W2007-00061-CCA-R3-CD, 2008 WL 2368909, at *14 (Tenn. Crim. App., at Jackson, June 10, 2008). Additionally, this Court has previously held that Blakely violations are subject to a Constitutional harmless error analysis. State v. Chester Wayne Walters, No. M2003-03019-CCA-R3-CD, 2004 WL 2726034, at *24 (Tenn. Crim. App., at Nashville, Nov. 30, 2004), app. denied (Tenn. March 21, 2005).

We note that at Wilson's March 9, 2007 motion for new trial hearing, he argued that his sentence was excessive, in violation of Blakely, based on the enhancements imposed by the trial court. The trial court did not address the Blakely issue on the record or in its order denying Wilson's motion for new trial. Thus, Wilson is entitled to plenary review of this issue. See State v. Schiefelbein, 230 S.W.3d 88, 150, n. 1 (Tenn. Crim. App. 2007). Our review of the sentencing in this case is de novo, without a presumption of correctness. See T.C.A. § 40-35-401(d); State v. Ashby, 823 S.W.2d 166, 169 (Tenn.1991).

The sentencing hearing transcript in this case shows that Wilson was sentenced under the pre-2005 sentencing act. Although the date of the offense was between September 17, 2004, and September 18, 2004, Wilson was not sentenced until September 16, 2005. If Wilson had chosen to be governed by the 2005 amendments to the Sentencing Act, the effective date of which was June 7, 2005, he could have executed a waiver of his ex post facto rights. In his reply brief, Wilson states

that he was not given the option of signing a waiver. However, the exercise of the waiver option is at the defendant's election and need not be "offered" by the trial court. Accordingly, because there is no waiver contained in the record, Wilson's sentence is governed by the pre-2005 sentencing act.

The pre-2005 sentencing act required the trial court to begin its determination of the appropriate sentence with a "presumptive sentence." T.C.A. § 40-35-210(c) (2003). For Class A felonies, the presumptive sentence was the midpoint of the appropriate range for the offense. Id. For Class B, C, D, and E felonies, this presumptive sentence was the minimum in the appropriate range for the offense. Id. After the trial court established the presumptive sentence, the court was required to enhance the sentence within the appropriate range based on the existence of the relevant enhancement factors and was required to decrease the sentence based on the existence of the relevant mitigating factors. Id. § 40-35-210(d), (e) (2003). In the pre-2005 sentencing act, the trial court was granted discretion in determining the weight given to any enhancement or mitigating factor as long as the trial court followed the provisions of the Sentencing Act and supported its findings by the record. State v. Souder, 105 S.W.3d 602, 606 (Tenn. Crim. App. 2002). The only limitation on the trial court's discretion was that the enhancement factors (1) must be "appropriate for the offense" and (2) not "essential elements of the offense." T.C.A. § 40-35-114 (2003). Facts supporting enhancement factors in the trial court needed to be proven only by a preponderance of the evidence. State v. Winfield, 23 S.W.3d 279, 283 (Tenn. 2000).

In this case, Wilson was sentenced as Range II, multiple offender. For second degree murder, a Class A felony, the sentence range is twenty-five to forty years. T.C.A. § 40-35-112(b)(1) (2003). Accordingly, the presumptive sentence, which is the midpoint of the appropriate range, was 32.5 years in this case. See id. § 40-35-210(c) (2003). The trial court imposed a forty-year sentence, the maximum term of imprisonment for the offense.

In sentencing Wilson, the trial court applied the following two enhancement factors in violation of Blakely:

> (10) The defendant possessed or employed a firearm, explosive device or other deadly weapon during the commission of the offense; and
> (14) The felony was committed while on release status from a prior felony conviction.

Id. § 40-35-114(10), (14) (2003).

The proof at the sentencing hearing consisted of the pre-sentence report, which was admitted without objection, and a certified judgment from Florida containing separate convictions of trespass while armed with a dangerous weapon, attempted second degree murder, and aggravated battery. For these convictions, the pre-sentence report showed Wilson was ordered to serve an effective sentence of sixteen years and eleven months in the Florida Department of Corrections, followed by eight years of probation. Wilson did not object to the authenticity of the Florida judgment and convictions; therefore, the trial court classified him as a Range II, multiple offender. The State also provided the court with a probation violation report dated January 28, 2004, which showed that

Wilson had violated his probation because he was arrested for driving on a suspended license, DUI, and resisting arrest on January 21, 2004.

As previously stated, the trial court violated Blakely when it applied enhancement factors (10) and (14). However, as we will explain, Wilson's sentence is justified by his prior criminal history. As an initial matter, Wilson claims that the three prior convictions listed in the pre-sentence report classified him as a Range II, multiple offender and cannot be used to further enhance his sentence. See T.C.A. § 40-35-114(2) (2003); see id. § 40-35-106(a), (b)(4), (c) (2003). We disagree. Our law defines a "multiple offender" as a defendant who has received:

> (1) A minimum of two (2) but not more than four (4) prior felony convictions within the conviction class, a higher class, or within the next two (2) lower felony classes, where applicable; or
>
> (2) One (1) Class A prior felony conviction if the defendant's conviction offense is a Class A or B felony.

Id. As stated above, Wilson had previously been convicted of three prior felonies including: trespass while armed with a dangerous weapon, attempted second degree murder, and aggravated battery. Only two of these convictions, aggravated battery and trespass while armed with a dangerous weapon, are necessary to qualify Wilson as a Range II, multiple offender. As such, we conclude that Wilson's prior criminal history consisting of attempted second degree murder is sufficient to enhance his sentence to the maximum within the range. This enhancement factor, alone, can be used to enhance a sentence to the maximum and firmly embed it in the ceiling. See State v. Samuel D. Braden, No. 01C01-9610-CC-00457, 1998 WL 85285, at *7 (Tenn. Crim. App., at Nashville, Feb. 18, 1998); State v. James Taylor, Jr., No. W2006-02085-CCA-R3-CD, 2007 WL 3391433, at *6 (Tenn. Crim. App., at Jackson, Nov. 14, 2007); State v. Barry Singleton, No. W2006-02476-CCA-R3-CD, 2009 WL 1161782, at *7 (Tenn. Crim. App., at Jackson, Apr. 29, 2009). Accordingly, Wilson's prior conviction for attempted second degree murder is sufficient to enhance his sentence in this case. Wilson is not entitled to relief on this issue.

CONCLUSION

We conclude that the evidence was sufficient to support Wilson's conviction for second degree murder and that the trial court properly refused to declare a mistrial when the State referred to the victim's death in the instant case as a "murder" in its opening statement. Additionally, given that the pre-2005 version of the Tennessee Sentencing Act was applicable in this case, the trial court erred in considering enhancement factors in violation of Blakely. However, we conclude that Wilson's sentence is justified by his prior criminal history. We further conclude that the trial court properly instructed the jury. Accordingly, the judgment of the trial court is affirmed.

CAMILLE R. McMULLEN, JUDGE